IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 26TH JUNE 2007 / 5TH ASHADHA 1929

SA.No. 46 of 1994()

AS.54/1992 of SUB COURT, VADAKARA
OS.20/1991 of MUNSIFF COURT, NADAPURAM
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APPELLANT: RESPONDENT:PLAINTIFF:

KAMMAN ABDULLA HAJI,
S/O.AMMAD,
THUNDIYIL, KAYAKKODI AMSOM, DESOM,
VADAKARA TALUK.

BY ADV. SRI.K.P.DANDAPANI (SR.)
SMT.SUMATHY DANDAPANI

RESPONDENT:APPELLANT:DEFENDANT:

PARAPPUMMAL KOORI KUNHAMMAD HAJI,
S/O.MAMMU, MANHAGATTU POYIL, KAYAKKODI AMSOM DESOM,
VADAKARA TALUK.

BY ADV. SRI.R.PARTHASARATHY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.57/1994 IN S.A.NO.46/1994

DISMISSED

26/06/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 46 OF 1994

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Dated this the 28th day of June, 2007

JUDGMENT

Plaintiff in O.S. 20/1991 on the file of Munsiff Court, Nadapuram is the appellant. Defendant is the respondent. Plaint schedule property originally admittedly belonged to respondent. Under Ext.A1 registered sale deed executed on 20.7.1974, one third right over the plaint schedule property was conveyed to appellant by respondent. Suit was filed seeking partition and separation of his one third share. Respondent resisted the suit contending that Ext.A1 sale deed, though styled as a sale deed, was never intended to be a sale deed but was executed as security for Rs.8000/- borrowed from appellant. It was contended that there was an oral agreement between the parties that when respondent repays Rs.8000/- borrowed, appellant will execute a sale deed reconveying the property and possession of the

property was not handed over and the sale deed was not acted upon and therefore appellant is not entitled to seek partition and separation of the property. Before the trial court, appellant was examined as PW1 and two more witnesses were examined. On the side of the respondent, he was examined as DW1. Exts.A1 and A2 and B1 to B2 series were also marked. Learned Munsiff on the evidence found that Ext.A1 is a sale deed and under section 92 of the Indian Evidence Act, respondent is not entitled to adduce evidence modifying or verifying the terms of Ext.A1 and therefore respondent is not entitled to contend that it is not a sale deed but a security. Holding that under Ext.A1, appellant purchased one third right over the plaint schedule property, a preliminary decree for partition of the plaint schedule property into three equal shares and allotment of one such share with future share of profits from the date of the suit was granted. Defendant challenged the decree and judgment before Sub

Court, Vadakara in A.S.54/1992. Learned Sub Judge relying on the decision of the High Court of Calcutta in **Sukumar Bysack v. S.K.Banerjee (AIR 1972 207)** held that as respondent is not relying on Ext.A1 sale deed and his case is that it was not executed as a sale deed, evidence could be adduced in support of the case of the respondent that it was never intended to be executed as sale deed but as security. Relying on the evidence, first appellate court found that Ext.A1 was executed only as security and not as a sale deed and therefore set aside the preliminary decree and dismissed the suit. It is challenged in the Second Appeal.

2. Second Appeal was admitted formulating the following substantial questions of law.

1) When all the ingredients of a sale as provided under section 54 of Transfer of Property Act are specified, whether Ext.B1 agreement could be termed mortgage or security.?

2) Whether defendant is not barred under

section 91 and 92 of the Evidence Act from pleading that Ext.B1 is not a sale deed but was executed as security?

3. Learned counsel appearing for appellant and respondent were heard.

4. Learned counsel appearing for appellant relying on the decision of the Apex Court in **Bishwanath Prasad Singh v. Rajendra Prasad (2006) 4 SCC 432)**and a decision of the learned single Judge of this court (as His Lordship then was)in **Moosa v. Moideen 2001(1) KLT 183)**argued that case of respondent was not that Ext.B1 sale deed was a sham and nominal document or that it was not to be acted upon but was that it was to be acted upon as a sale deed with the plea that on receipt of alleged loan amount reconveyance deed is to be executed and so respondent is not entitled to adduce evidence against the terms and conditions of Ext.A1 sale deed in view of the provisions of Section 92 of Evidence Act. It was also argued that what was

contended by the respondent was about the existence of an agreement for reconveyance, which is absent in Ext.A1, though it was present in the earlier sale deed executed by the respondent in favour of Kunhammad and in such circumstance, first appellate court should not have interfered with the findings of the trial court and appellant is entitled to a decree for partition.

5. Learned counsel appearing for respondent relying on the decision of Apex Court in **Gangabai v. Chhabubai (AIR 1982 SC 20)** and the decision of the Calcutta High Court relied on by the first appellate court argued that specific case of the appellant was that Ext.B1 sale deed was not intended to be acted upon as a sale deed and there was an oral agreement between the parties that on payment of the loan of Rs.8000/- received by the respondent, appellant would execute a reconveyance deed and therefore as provided under proviso to Section 92 of Evidence Act, respondent is entitled

to lead evidence and first appellate court properly appreciated the evidence and there is no reason to interfere with the findings. It was also argued that evidence establish that the appellant did not know anything about execution of the sale deed and did not obtain possession of the property and even the original of Ext.B1 sale deed was with the respondent and all these circumstances strengthen the findings of the first appellate court that Ext.A1 was not a sale deed but was only executed as security and therefore there is no reason to interfere with the findings of the first appellate court.

6. Ext.A1 is a registered sale deed executed by the respondent in favour of the appellant whereunder one third right over the plaint schedule property was conveyed by respondent in favour of the appellant. As rightly argued by learned counsel appearing for appellant, Ext.A1 satisfies all the ingredients of a sale as provided under section 54 of the Transfer of Property Act.

Ext.A1 establish that it is a sale deed. What was contended by respondent was that Ext.A1 sale deed was executed as the appellant insisted for a sale deed, when he borrowed Rs.8000/-, to enable respondent to purchase the plaint schedule property from Kunhammad. It is admitted case that the property originally belonged to respondent under a lease and thereafter for Rs.8000/- the property was sold by respondent in favour of Kunhammad and that sale deed contained a clause for reconveyance, which was enforced by the respondent. The case of the respondent was that to enable him to pay that amount to Kunhammad, he had to borrow money from appellant, who is his uncle and as insisted by appellant Ext.B1 sale deed was executed. What was contended was not that Ext.B1 was a sham and nominal document which was never intended to be acted upon. On the other hand, contention in the written statement itself was that as and when respondent pays the amount, allegedly borrowed from the appellant, appellant would execute a sale deed

reconveying his right over the property in favour of respondent. That itself establish that Ext.B1 sale deed was intended to be acted upon. If at all the case was regarding a reconveyance clause in the transaction which is definitely a modification of the terms in Ext.B1 sale deed. If that be so, what was pleaded by respondent was a modification of the terms of Ext.A1 sale deed to the effect that there was a reconveyance clause. Section 92 of the Indian Evidence Act is a bar to prove the existence of such a clause. If in fact there was such an agreement for reconveyance, Ext.B1 sale deed would have definitely incorporated such a clause, especially when it is the admitted case that when the property was earlier sold by respondent to Kunhammad, the sale deed contained such a clause which was subsequently enforced by respondent and the property was purchased.

7. An identical question was considered by this Court in **Moosa's case (supra).** In that case also

the disputed sale deed was found to be a sale in terms of Section 54 of Transfer of Property Act. Here the case was not that the sale deed was a sham and nominal document, was executed as security. This court considered the effect of the proviso to Section 92 of Evidence Act and held:-

> "It is one thing to say that a person who has executed a sale deed in favour of another is not precluded from showing by virtue of the proviso to S.92 of the Indian Evidence Act that the transaction was not intended to be acted upon or from proving a collateral agreement independent of the written transaction. But, it is quite another thing to say that a person is not

entitled to seek a declaration that a sale deed executed by him in favour of another is not a sale deed but is only a deed of security. The decision of the Privy Council in Tyagaraja v. Vedathanni (AIR 1936 PC 70) and that of the Supreme Court in Gangabai v. Chhabubai (AIR 1982 SC 20) relied on by the courts below cannot have any application to a case of the present nature where the declaration sought for is one relating to the transaction reduced to writing and regarding the effect of that transaction.

The plea by the plaintiff that there was a parol agreement independent of the transaction for reconveyance of the property could certainly have been admissible in the light of the proviso to S.92 of the Indian Evidence Act. The decision of the Supreme Court was a case where what was attempted to be done was to show that the transaction was not intended to be acted upon. In our case what is pleaded in the plaint is that the defendant had agreed to reconvey the property on receiving the amount stated as consideration in the

sale deed but without following it up with a prayer for specific performance of that agreement. The present case found by the courts below is clearly a case to vary the terms of the document and as observed by the Supreme Court in the decision referred to by the Courts below the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement of statement can be admitted as between the parties to such document for the purpose of contradicting or

modifying its terms."

The decision of the Apex Court in **Gangabai's case** (supra)relied on by the counsel for respondent was discussed and distinguished in the said decision. Unfortunately first appellate court omitted to take note of the fact that in the case considered by the Calcutta High Court specific case was that the disputed document was a sham and nominal which was not acted upon. If parties not relying on the document and contended that the document was not intended to be acted upon and was a sham and nominal document, Section 92 will not preclude that party from leading evidence to show that intention of the parties was not the one reflected in the document. But as in this case, when the case of respondent itself was that Ext.B1 sale deed is to be acted upon and on receipt of the amount borrowed, a sale deed reconveying the right of the appellant is to be executed in favour of the respondent, it cannot be said that plea was that Ext.B1 was a sham and nominal document not acted

upon. If that be so, Section 92 of Indian Evidence Act precludes respondent from adducing oral evidence modifying the terms of Ext.A1 sale deed.

8. What was sought to be proved by respondent was also that in addition to the terms seen in Ext.A1, there was an additional oral agreement between the parties whereunder on payment of the amount by respondent appellant will reconvey the property. If that is a separate agreement, then unless it is reduced into writing and was registered, it cannot be relied on at all. On the facts and evidence, first appellate court was not correct in holding that respondent is entitled to lead evidence against the terms of Ext.A1.

9. Moreover, the fact that persuaded first appellate court to hold that Ext.B1 sale deed was not a sale was mainly the inadequate consideration. As pointed out by learned counsel appearing for respondent, it is admitted case that the total consideration shown in the sale deed whereunder the whole property was purchased by

respondent from Kunhammad was Rs.8000/-. Though learned counsel appearing for respondent argued that that was also only security but not as a sale deed, contention in the written statement is othersise. Contention in the written statement shows that, it was a sale and not a security. In such circumstance, finding of the first appellate court is unsustainable. Appellant is entitled to get his one third share in the plaint schedule property separated as has been found by the trial court.

The Second Appeal is allowed. The decree and judgment passed by the Sub Court, Vadakara in A.S.54/1992 are set aside. The decree and judgment passed by the Munsiff, Nadapuram in O.S.20/1991 is restored.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.46 /94

JUDGMENT

28TH JUNE,2007